82-8

No. 81-

ALEXANDER L. STEVAS, CLERK
Office - Supreme Court, U.S.
FILED
JUL 1 1982
ALEXANDER L. STEVAS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CALIFORNIA STATE BOARD
OF EQUALIZATION,

APPELLANT,

v.

WESTERN MARINA CORPORATION,
dba SHELTER ISLAND INN,

APPELLEE.

ON APPEAL FROM THE UNITED
STATES COURT OF APPEALS,
NINTH CIRCUIT

JURISDICTIONAL STATEMENT

GEORGE DEUKMEJIAN,
Attorney General
NEAL J. GOBAR,
Deputy Attorney General
110 West A Street,
Suite 700
San Diego, California 92101

Counsel for Appellant

QUESTIONS PRESENTED

I Are the Second and Fifth Circuits correct in In re Leavy (2d Cir.) (1936) 85 F.2d 25 and In re Hatfield Construction Company (5th Cir. 1974) 494 F.2d 1179, or is the contrary ruling of the Ninth Circuit in California State Board of Equalization v. Goggin (1957) 245 F.2d 44 (hereinafter sometimes "Goggin II"), that federal law precludes requiring a fiduciary to collect and pay a (sales or use) tax based on a liquidation sale under jurisdiction of the federal bankruptcy court, correct?

II Does federal law prohibit California from imposing its use tax (and the duty to collect it) with respect to sale by a corporation operating under Chapter XI of all its business assets as a going business.

* * * * *

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
OPINIONS BELOW	2
JURISDICTION	3
CONSTITUTIONAL AND STATUTORY PROVISIONS	4
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	8 - 13
I This Court Should Resolve The Direct Conflict Between Circuits Whether a Sales/ Use Tax on the Purchaser May be Imposed on Sales by Liquidating Bankruptcy Fiduciaries	8
II Any Restriction on Taxation of "Liquidation" Sales Should Not Preclude a State From Taxing the Sale as a Going Business Which is Operating Under Bankruptcy Law, the Same as it Taxes All Other Sales of Operating Businesses	12
CONCLUSION	14

TABLE OF CONTENTS
(APPENDIX)

Pages

Appendix A:

Opinion of Ninth Circuit in Final Judgment

Memorandum A-1 - A-7

Order (Amendment) A-8 - A-9

Appendix B:

Lower Court Findings and Opinions

Order Affirming Bankruptcy Court Order Disallowing Claim of California State Board of Equalization in its Entirety A-10 - A-13

Findings of Fact and Conclusions of Law on Order Disallowing Claim No. 120 Filed by California State Board of Equalization A-14 - A-25

Appendix C:

Judgment Appealed From and Order on Rehearing

Judgment Appealed From A-26

Order (on rehearing) A-27 - A-28

Petition for Rehearing A-29 - A-36

Pages

Appendix D:

Notice of Appeal filed

Notice of Appeal to the Supreme Court of the United States A-37 - A-38

Appendix E:

California Revenue and Taxation Code, sections

6201 A-39 - A-40

6202 A-41

6203 A-42 - A-44

6204 A-45

TABLE OF CITATIONS

	Pages
CASES	
Calif. Board of Equalization v. Goggin 245 F.2d 44	8,9,10,12
In re Hatfield Construction Co. (1974) 494 F.2d 1179	9,10
In re Leavy (1936) 85 F.2d 25	9
United States v. Sampsell (1959) 266 F.2d 631	10
STATUTES	
28 United States Code, § 960	9,10 12,13

No. 81-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

CALIFORNIA STATE BOARD
OF EQUALIZATION,

Appellant

v.

WESTERN MARINA CORPORATION
dba, SHELTER ISLAND INN,

Appellee.

ON APPEAL FROM THE UNITED
STATES COURT OF APPEALS,
NINTH CIRCUIT

JURISDICTIONAL STATEMENT

Appellant California State Board of Equalization (SBE) appeals from the judgment of the U.S. Court of Appeals for the Ninth Circuit which prevents California from collecting its sales or use tax with respect to transfer of

personal property as part of a sale of Appellee Western Marina's entire business as a going business while under Chapter XI proceedings.

OPINIONS BELOW

None of the lower court opinions are published. The Court of Appeals' "Memorandum" filed January 15, 1982, appears in Appendix A at pages A-1 to A-7; its "Order" (amending Memorandum) filed January 21, 1982 appears at pages A-8; and its "Order" filed April 7, 1982 denying petition for rehearing and suggestion for rehearing en banc, appears in Appendix C at pages A-27 to A-28.

The District Court decision, entitled "Order Affirming Bankruptcy Court Order Disallowing Claim of California State Board of Equalization in its Entirety," filed September 18, 1982, appears in Appendix B, pages A-10 to A-13.

The Bankruptcy Court's decision entitled, "Findings of Fact and Conclusions of Law on Order Disallowing Claim No. 120" Filed by California State Board of Equalization," filed April 21, 1980, appears in Appendix B, pages A-14 to A-25.

JURISDICTION

The Court of Appeals for the Ninth Circuit filed its "Memorandum" judgment on January 15, 1982, and its "Order" (amending its judgment) January 21, 1982. Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc was filed February 1, 1982, and was denied by "Order," filed April 7, 1982. A Notice of Appeal was filed in the Court of Appeals on June 1, 1982. (Appen. D, pp. A-37-A-38.) The time within which to docket this appeal expires on July 6, 1982. Timely docketing has been made. Jurisdiction of the United States Supreme Court is

invoked under 28 U.S.C. § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 United States Code section 960 provides:

> "Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."

California Revenue and Taxation Code, sections 6201, 6202, 6203 and 6204, which impose use tax and the duty to collect it here, are contained in the Appendix E, pages A-39 through A-45.

STATEMENT OF THE CASE

California imposes a use tax which is not significantly different in effect on the seller from the sales taxes which the 2d and 5th Circuits have held must be collected and paid over by

bankruptcy trustees. (See In re Hatfield Construction Co. (1974) 494 F.2d 1179; In re Leavy (1936) 85 F.2d 25.) However, the Ninth Circuit in 1957 (Calif. Board of Equalization v. Goggin 245 F.2d 44) (incorrectly interpreting a series of earlier California decisions[1/]), stated in an opinion containing very broad language that the California use tax was an illegal interference with the bankruptcy liquidating

---

1. A case called "Goggin I," California Board of Equalization v. Goggin (CA9 1951) 191 F.2d 726, misinterpreted earlier cases and California sales tax law in construing California sales tax not to apply to sales by bankruptcy trustees in liquidating, i.e., putting an end to, a business. This Court is not asked to concern itself with the Goggin I question because under California law, a use tax is payable if a sales tax is not. (Cal. Rev. & Tax Code, § 6401.) Only one of these two taxes is payable in any event, and the 2d and 5th Circuit decisions appear to clearly permit taxes which are substantially equivalent (for our purposes) to the California use tax. The Goggin II use tax case is in clear conflict with other circuits, and its reversal (or distinction) will permit California and other 9th Circuit states to collect their use type taxes.

process and enjoined SBE from collecting it from bankruptcy trustees or purchaser.

The court below felt bound by the broad language of Goggin II stating,

> "While we deem ourselves bound by . . . Goggin II as stating the law of our circuit, we have serious reservations as to the soundness of those rulings and urge en banc review. Cf., In re Hatfield Construction Company, 494 F.2d 1179 (5th Cir. 1974); In re Leavy 85 F.2d 25)." (Memorandum, CA 9 Cir, filed Jan. 15, 1982, as amended by Order filed Jan. 21, 1982.)

Thus, the Ninth Circuit has recognized that its earlier Goggin decision prevents Ninth Circuit states from collecting taxes on transactions identical to those which all other states are free to tax. This is the type of situation in which action by the United States Supreme Court to provide uniformity is essential. The reasoning of the Ninth Circuit "Goggin"

rule does not withstand analysis and is inconsistent with its own and other circuit rulings which allow other taxes to "burden" the bankruptcy liquidation process.

The "Goggin" rule is stated by the court below to be that "where a trustee, pursuant to a liquidation order, sells property of the debtor estate, California may not collect its sales or use tax." (Appen. A-3 - A-4.) Even were such a rule proper, it should not be expanded to prevent collection of a use tax on sale of a continually operated business as a going business.

* * * * *

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I

THIS COURT SHOULD RESOLVE THE DIRECT CONFLICT BETWEEN CIRCUITS WHETHER A SALES/USE TAX ON THE PURCHASER MAY BE IMPOSED ON SALES BY LIQUIDATING BANKRUPTCY FIDUCIARIES

The lower court here felt bound by a 1957 Ninth Circuit decision ("Goggin II" 245 F.2d 44) which held no use tax was collectible on sales by a bankruptcy trustee made after the court had ordered cessation of business and liquidation of the assets. The Court of Appeals here held that Goggin II creates a broad rule of non-taxability whenever there is "liquidation." (Appen. pp. A-5 - A-6.) It recognized that this Ninth Circuit rule is directly contrary to the decisions in the 2d and 5th Circuits stating,

. . . . .

. . . . .

> "While we deem ourselves bound by Goggin I[2] and Goggin II as stating the law of our circuit, we have serious reservations as to the soundness of those rulings and urge en banc review. Cf., In re Hatfield Construction Company, 494 F.2d 1179 (5th Cir. 1974); In re Leavy, 85 F.2d 25 (2d Cir. 1936)." (Appen. A-6 to A-7.)

The 5th Circuit also recognized in its Hatfield 1974 case the direct conflict between Goggin II and the 2d Circuit's In re Leavy. That court rejected Goggin II, finding the "well reasoned opinion of the Court of Appeals for the Second Circuit" the more persuasive. (See In re Hatfield, supra, at p. 1180.)

The analysis contained in Goggin II is faulty. It states that any act which burdens the liquidation process in invalid (Hatfield, supra, at pp.11180-1181.) and construes 28 United States Code, § 960

---

2. See Footnote 1.

as a Congressional limitation on the power to to tax. (Id., at p. 1181.) Such statements conflict with a number of additional circuit court rulings and authorities recognizing that various taxes are proper, even though they burden the liquidation process. (See the Ninth Circuit's own United States v. Sampsell (1959) 266 F.2d 631, 635, and cases and authorities cited in In re Hatfield, supra, 494 F.2d 1179, 1181.)

Probable jurisdiction should be noted so this Court can (1) resolve the direct conflict between this case and the 2d and 5th Circuits, (2) clarify or disapprove the statements in Goggin II which seem to invalidate any burden on bankruptcy proceedings, and construe 28 U.S.C., § 960 as a limitation on the taxing power (contrary to holdings in a number of cases), and (3) equalize the scope of taxation involving bankruptcy of

of those states within the Ninth Circuit with that of states in other circuits.

* * * * *

II

ANY RESTRICTION ON TAXATION OF "LIQUIDATION" SALES SHOULD NOT PRECLUDE A STATE FROM TAXING THE SALE AS A GOING BUSINESS WHICH IS OPERATING UNDER BANKRUPTCY LAW, THE SAME AS IT TAXES ALL OTHER SALES OF OPERATING BUSINESSES

Goggin II involved sales by a bankruptcy trustee of individual items belonging to a business which earlier had closed under a specific court order to stop all operations and liquidate the assets. The broad language in that case was felt by the court here to establish a broad rule under which the operating debtor in possession in a Chapter XI proceeding here who sold his business as a going business is excused under Goggin II from collecting and paying (use) tax otherwise due.

SBE believes that extension of the Goggin II holding to this situation conflicts directly with 28 U.S.C., § 960. It creates a loophole under which any

retailer[3] may avoid tax simply by filing a reorganization petition and asking the court to approve the sale of the going business. 28 U.S.C., § 960 should be construed to apply to the sale of a business as a going business, i.e., the final business act, as well as all other business activities. The business operated and sold under bankruptcy court supervision receives the continuous benefits of state and local government which increase its financial gain when permitted to continue business operations and sell as a going business. It should pay its share of the taxes to state and local government just like any other seller of a going business.

* * * * *

---

3. Appellee was threatened with foreclosure. However, any business wanting to sell out can undoubtedly (in today's economy) arrange its financial affairs so that it is short of cash to pay current bills to justify filing a petition in the bankruptcy court and then sell the business with bankruptcy court approval.

CONCLUSION

The court should note probable jurisdiction:

(1) to resolve (by disapproving Goggin II) the direct conflict between this Ninth Circuit's Goggin II and the contrary decisions of the 2d and 5th circuits;

(2) to clarify (by disapproving) the broad language in Goggin II suggesting that any burden on the bankruptcy liquidating process is invalid; and

(3) clarify the meaning and effect of 28 U.S.C., § 960 (by construing it, not as a limit on the power to tax, but as an express [non-exclusive] requirement that Federal court fiduciaries pay state and local taxes the same as anyone else

. . . . .

with respect to operation of any business, including the disposition of a going business.)

Respectfully submitted,

GEORGE DEUKMEJIAN
Attorney General

NEAL J. GOBAR,
Deputy Attorney General

Attorneys for Appellant,
California State Board of
Equalization